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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 131

EDMUND P. DANDRIDGE, JR., CHAIRMAN OF THE MARYLAND STATE BOARD OF PUBLIC WELFARE, ET AL.,

Appellants,

—v.—

LINDA WILLIAMS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF *AMICI CURIAE:* THE CENTER ON SOCIAL WELFARE POLICY AND LAW, NATIONAL WELFARE RIGHTS ORGANIZATION, ASSOCIATED CATHOLIC CHARITIES, INCORPORATED, AND SEVEN NEIGHBORHOOD LEGAL SERVICES OFFICES NOW PROSECUTING SIMILAR CASES

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In the

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No. 131

Edmund P. Dandridge, Jr., Chairman of the Maryland State Board of Public Welfare, et al.,

Appellants,

—v.—

Linda Williams, et al.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF *AMICI CURIAE:* THE CENTER ON SOCIAL WELFARE POLICY AND LAW, NATIONAL WELFARE RIGHTS ORGANIZATION, ASSOCIATED CATHOLIC CHARITIES, INCORPORATED, AND SEVEN NEIGHBORHOOD LEGAL SERVICES OFFICES NOW PROSECUTING SIMILAR CASES

Interest of *Amici Curiae**

The Center on Social Welfare Policy and Law is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. Affiliated

* Letters from appellants and appellees consenting to the submission of this brief *amici curiae* have been filed with the Clerk.

with the Columbia University School of Law, the Center undertakes research pertaining to the legal rights of welfare recipients and supports OEO-funded legal services programs and other legal organizations through education and assistance in the preparation of important litigation. In this capacity the Center has rendered substantial assistance in most of the cases challenging maximum grants in public assistance. The Center has also appeared before this Court in two arguments this term (*Goldberg* v. *Kelly*, No. 62, and *Rosado* v. *Wyman*, No. 540) and has submitted briefs *amicus curiae* in *King* v. *Smith*, 392 U.S. 309 (1968), *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *Simmons* v. *Housing Authority of West Haven*, O.T. 1969, No. 81; *Boddie* v. *Connecticut*, O.T. 1969, No. 265; *Sanks* v. *Georgia*, O.T. 1969, No. 266; and *Wheeler* v. *Montgomery*, O.T. 1969, No. 14. The Center also maintains the nation's only comprehensive private collection of state public assistance regulations and manuals. The Center, together with the federally funded legal services programs throughout the nation, has a vital interest in presenting to this Court the full range of issues raised and rules affected by this case.

The National Welfare Rights Organization was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and teach individuals in need of financial assistance how to secure public assistance benefits. The membership of the National Welfare Rights Organization includes more than 30,000 households organized in 200 affiliated groups in 70 communities in 37 states. Since many of its members receive far less than the amounts their state departments of welfare have determined are necessary for minimal subsistence, often as the result of the imposition of grant

maximums, the organization has devoted much of its energies and resources to the abolition of arbitrary restrictions on grant amounts.

Associated Catholic Charities, Incorporated is a private charitable organization that provides counseling and other services, as well as limited material aid, to many of the poor people in the City of Baltimore who lack the basic necessities of life. Catholic Charities has insufficient funds, however, to meet the dire needs of all those individuals and families who seek its assistance. It is particularly concerned about that group of the poorest of the poor families, large families with little or no income. It thus has a vital interest in apprising this Court of the manifest injustices resulting from the State of Maryland's imposition of a maximum AFDC grant applying regardless of family size.

The legal services offices that appear as *amici curiae* have represented plaintiffs in the actions other than this case in which grant maximums have been declared unconstitutional by various three-judge district courts, or are representing plaintiffs in actions currently pending in three-judge district courts in which the validity of grant maximums are being challenged, as follows: Pine Tree Legal Assistance, Inc. (Portland, Maine)—*Westberry* v. *Fisher,* 297 F. Supp. 1109 (D. Me., S.D. 1969); Legal Aid Society of the Pima County Bar Association (Tucson, Arizona)—*Dews* v. *Henry,* 297 F. Supp. 587 (D. Ariz. 1969); Seattle Legal Services Center (Seattle, Washington)—*Lindsey* v. *Smith,* —— F. Supp. —— (Civ. No. 7636, W.D. Wash., opinion filed Aug. 20, 1969); Neighborhood Legal Assistance Foundation (San Francisco, California) —*Kaiser* v. *Montgomery,* —— F. Supp. —— (Civ. No.

49613, N.D. Cal., opinion filed Aug. 28, 1969); Legal Aid Society of Charleston (Charleston, West Virginia)—*Powers* v. *Vincent,* Civ. No. 68-170, S.D. W.Va.; Legal Aid Society of Albuquerque (Albuquerque, New Mexico)—*Salazar* v. *Goodwin,* Civ. No. 8027, D. N.Mex.; Atlanta Legal Aid Society, together with Michael A. Doyle, Esq. (Atlanta, Georgia)—*Thomas* v. *Burson,* Civ. No. 2381, M.D. Ga. These offices are directly and vitally concerned with the decision of this Court, which will determine the right of their clients and the class they represent to receive an amount of public assistance not limited by the application of an arbitrary grant maximum.

Statement of the Case

Every state in the union provides financial assistance to needy dependent children under the Aid to Families with Dependent Children (AFDC) program.[1] Through this program, states distribute funds, the major portion of which is obtained from federal grants-in-aid, pursuant to the Social Security Act of 1935 for the purpose of:

1. "encouraging the care of dependent children in their own homes . . . to help maintain and strengthen family life," and
2. "furnish[ing] financial assistance . . . to needy dependent children and the parents or relatives with whom they are living." (The Social Security Act of 1935, §401, 42 U.S.C. §601.)

To receive aid, a child must satisfy three basic federal requirements. The child must be: (1) needy, (2) "deprived of

[1] See *King* v. *Smith,* 392 U.S. 309, 311 (1968).

parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and (3) living with a parent or other statutorily specified relative. 42 U.S.C. §606. In addition, the child must satisfy any state-imposed eligibility condition consistent with the Social Security Act and the United States Constitution.

The state determines the amount of assistance payable to a child by first determining need, that is, the type and quantity of goods and services minimally necessary for subsistence and the amounts of money required to purchase such goods and services.[2] (For example, appellants determined need for Mrs. Williams and her eight children as being $296.15 per month and that for Mr. and Mrs. Gary and their eight children as being $331.50.) From need, the state subtracts available resources, such as earned income, savings, and Social Security benefits, to determine the recipient's "budgetary deficit." (Neither appellee family possessed such resources.) To supply a child or family with the basic wherewithal necessary for subsistence, a state would have to grant an amount equal to this budgetary deficit. However, many states do not meet the full budgetary deficit, leaving families with less than the state's conservative, often penurious, estimate of the minimum amount needed for subsistence. Twenty-three states currently impose various types of maximums limiting public assistance to some fraction of the state-determined budgetary deficit.[3] There are two principal types of such maximums: individual maximums and family maximums. States imposing

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[2] *Id.*, at 318-19, n. 14.

[3] See Appendix A for details of the maximum grant schedules of all states imposing them.

individual maximums simply limit the assistance available to any person or class of persons to a fixed amount. This amount may be the same for all public assistance recipients or it may vary with some characteristic of the individual, as for example the number of children in his family. The maximum may be expressed as a flat dollar amount (individual maximum) or a percentage of the family's budgetary deficit (percentage reduction) or in both such ways.[4] Thus, the state of Mississippi limits the amount of AFDC assistance payable to $30 per month for the first child in any family, $18 for the second, and $12 for the third, while simultaneously limiting assistance to no more than 30 per cent of a child's budgetary deficit and paying the lesser of the amounts indicated by these two limitations. Listed in Table 1 below are the fixed-dollar individual maximums imposed by the various states as of varying recent dates.[5]

TABLE 1—INDIVIDUAL MAXIMUMS

State	First Child	Second Child	Fifth Child	Tenth Child
Arkansas	$ 60	$ 10	$ 10	$ 0
Delaware	75	12	10	0
Tennessee	48	16	16	0

[4] The percentage reduction device is in no way at issue in this case. For details as to those states that impose both grant maximums and a percentage reduction, see National Center for Social Statistics, Social and Rehabilitation Service, U.S. Dept. of Health, Education, and Welfare, Report D-3 (Oct. 1968), Tables 2 and 3.

[5] See Appendix A, Tables 2 and 3 for further details and effective dates. Ten of the 17 states listed combine individual maximums with family maximums, see Table 2 *infra*, the effect of which is to cut off payments before the tenth child is reached.

State	First Child	Second Child	Fifth Child	Tenth Child
Mississippi	30	18	12	0
California	148[5a]	24	37	6
Nevada	25[5b]	25[5b]	25[5b]	25[5b]
Indiana	50	25	25	25
Missouri	46	26	26	26
Arizona	80	27	27	0
Maine	40	30	27	0
Nebraska	110[5a]	30	30	0
Alabama	50	30	30	0
Georgia	40	31	31	0
Oklahoma	46	39	31	0
Alaska	50	40	40	40
Utah	90	48	20	14
Wyoming	100	70	15	0

Individual maximums may or may not be imposed as to all classes of public assistance recipients. Typically, they are imposed with particular ferocity upon AFDC children. Thus, the state of Mississippi pays 100 per cent of need (subject to certain fixed-dollar maximums) to recipients in the "adult categories" of public assistance, the aged (OAA), the blind (AB) and the disabled (APTD), while

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[5a] Amount represents payment for first child and one adult; no allocation given between adult and child.

[5b] Plus 20 per cent of unmet need.

paying 30 per cent of need to children. Similarly, the fixed-dollar maximum applicable to the Mississippi adult categories is more than four times the fixed-dollar maximum applicable to third and subsequent children.

The second principal type of maximum is the family maximum challenged in this case, whereby a state limits the amount of assistance available to a family to some fixed-dollar figure, irrespective of the children's or family's state-determined need or budgetary deficit. Because of the Maryland family maximum, appellees Gary and Williams, residents of Baltimore, received family grants of only $250 per month despite the fact that the state determined their budgetary deficits to be $296.15 and $331.50 respectively.[6] As is indicated in Table 2 below, family maximums are in force in 16 states, 10 of which also impose individual maximums.[7]

TABLE 2—FAMILY MAXIMUMS

State	Family Maximum
Mississippi	$108
Arkansas	120
Delaware	150
Tennessee	150
Georgia	164
West Virginia	165

[6] For families residing in Maryland outside the city of Baltimore, the family maximum is $240 per month.

[7] See Appendix A, Tables 1 and 2 for further details and effective dates.

State	Family Maximum
Alabama	170
New Mexico	190
Arizona	220
Wyoming	230
Virginia	245
Maine	250
Maryland	250
Kentucky	320
Washington	325
Oklahoma	353

States differ in the methods by which they relate family maximums to available resources.[8] Maryland subtracts available resources[9] from need, so that a family having a state-determined need of $350 per month and outside income of $100 per month would have its need fully met through a combination of the $250 family-maximum grant and $100 of earnings. Under the Arizona maximum litigated in *Dews* v. *Henry*, 297 F. Supp. 587 (D. Ariz. 1969), on the other hand, available resources were subtracted from the $220 family maximum, not from need. 297 F. Supp. at 590.

[8] 42 U.S.C. §602(a)(7) provides that in determining need the state shall take other income and resources of the child or caretaker fully into consideration. That provision does not, however, reach the issue of how other income and resources are to be treated vis-à-vis a maximum grant unrelated to need.

[9] In defining available resources, all states must disregard a portion of all income under the federal work incentive program. 42 U.S.C. §§602(a)(8), 602(a)(19), and 634.

Thus the family in the example given above would receive only $220 as a combination of the AFDC grant ($120) plus income ($100) and would face an unmet need of $130 monthly.[10]

Despite these variations in state maximum-grant provisions, they have in common one basic distinction. Two classes of AFDC recipients are created: those whose state-determined needs are less than the relevant maximum and those whose needs exceed that figure. Those recipients whose needs do not exceed the maximum receive AFDC assistance commensurate with their needs in conformity with the central purpose of the AFDC program; those recipients whose needs exceed the maximum receive a grant the amount of which is fixed by the maximum and which consequently fails to meet their need.[11]

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[10] A variation of this latter method is found in *Westberry* v. *Fisher*, 297 F.Supp. 1109 (D. Me., S.D. 1969), in which the Maine maximum grant of $250 was combined with a so-called maximum budgeted need of $300. 297 F.Supp. at 1111-13. Income and resources were subtracted from need unless need exceeded $300, in which case they were subtracted from $300, payments in any case not exceeding the maximum of $250. Thus in the example given, subtracting income of $100 from the maximum budgeted need of $300 would result in a grant of $200, leaving the family with $50 of unmet monthly need.

[11] In general, the difference between the two classes of families is one of size, although special needs such as medically mandated diet requirements and school supplies play some part in increasing a family's level of need. Maryland bases its need determination on a single standard for subsistence (food, clothing, household maintenance, and household replacements) that varies by family size; a shelter requirement based on rent actually paid within a schedule of maximums differing by family size and geographical location; separate requirement standards for children cared for by a relative other than a parent; and special requirement standards, when appropriate, covering special diet requirements, school supplies for children attending school, laundry costs, and life insurance premiums to provide for burial. State of Maryland, Manual of the Department of Social Service, Rule 200-V.

Family maximums, in addition, impose another and more egregiously unlawful distinction, namely, that between children (and parents) in large families and those in smaller families. In Maryland, a child born into a penurious single-parent family will have his state-determined needs met in full if no more than four siblings preceded him. For the sixth and subsequent children in a single-parent family, nothing is paid. Such a child the state wholly deprives of benefits accorded children in smaller families. Of course it is anticipated that such a child will share in the meager amounts provided for his older brothers and sisters and his mother or other caretaker relative. The effect of his deprivation may thus be thought of as diffused among all members of his family, thus expanding the class of those disadvantaged by the state of Maryland's distinction to all members, child and adult, of the larger family. Taking this more expanded view of the disadvantaged class sharply narrows the difference between family maximums and individual maximums such as Mississippi's (under which the first child receives a maximum of $30 per month and the third and subsequent children receive $12), at least where the difference bears no relation to the economies of larger families.[12]

Subclasses are even formed within the class of children in those families subject to the maximum grant. Such children receive per-capita grants the amount of which is based solely on the number in the family. Thus a child in a family of eight receives 50 per cent more than a child

[12] Indeed, in *Ward* v. *Winstead*, now pending in the Northern District of Mississippi (Civ. No. GC 6829-K), the state has asked the court to delay adjudication because the Court's decision in this case will be dispositive.

in a family of 12, and in neither case is the size of the grant based on need.[12a]

The balance of this brief is devoted to an analysis of the discriminatory deprivation worked by this distinction between recipients in large families and recipients in smaller families and to an ultimately futile search for some justification for this apparently discriminatory distinction. In the end, it is devoted to an explanation of why family maximums have been declared unconstitutional by every court, state and federal, that has considered the question. See *Williams* v. *Dandridge*, 297 F. Supp. 450 (D. Md. 1968, 1969); *Dews* v. *Henry*, 297 F. Supp. 587 (D. Ariz. 1969); *Westberry* v. *Fisher*, 297 F. Supp. 1109 (D. Me. 1969); *Lindsey* v. *Smith*, —— F. Supp. —— (Civ. No. 7636, W.D. Wash. 1969); *Collins* v. *Board of Social Welfare*, 248 Iowa 369, 81 N.W.2d 4 (1957). See also *Kaiser* v. *Montgomery*, —— F. Supp. —— (Civ. No. 49613, N.D. Cal. 1969), enjoining application of California's individual maximums.

Summary of Argument

The Maryland regulation establishing a ceiling on the size of the grant any family may receive under the federally funded Aid to Families with Dependent Children (AFDC) program creates two classes of recipient families: Those families whose state-determined needs do not exceed

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[12a] Parents with a sufficient number of children to be affected by the grant maximum receive aid the amount of which is based solely on the number of their children, decreasing in amount as children increase in number, rather than being based on need. This result infringes not only on their right to the equal protection of the laws, but also on their exercise of constitutionally protected activity, see p. 48, *infra*.

the maximum receive a grant commensurate with their needs, while those families whose needs exceed the maximum receive a grant the amount of which is below, and bears no relation to, their needs. The difference between the two classes of families is in general one of size, with larger families comprising the disadvantaged class.

The classification thus created denies the equal protection of the laws to members of the disadvantaged class in that the classification bears no relation to, but is subversive of, the dual purposes of Title IV of the Social Security Act: fulfilling the financial needs of needy dependent children and their caretakers and promoting the care of such children in the family home. As to the former, the grant maximum ignores a significant portion of the needs of those families affected by it; as to the latter, the grant maximum encourages the placement of children outside the family home and in the custody of a relative eligible to receive benefits on their behalf unaffected by the maximum.

The grant maximum and the classification it creates warrants the strict scrutiny of this Court for a number of reasons: the classification affects appellees' ability to obtain the fundamental necessities of existence; it reaches a class characterized by political powerlessness; it undermines the integrity of the basic family unit; and it creates a class of children based on a status over which they have no control.

The various state interests proffered as justifying the imposition of a grant maximum fail to save the challenged classification from invalidity under the Equal Protection Clause. They are but tenuously related to the composition of the disadvantaged class; they ignore and subvert the intent of Congress as to how these interests are to be attained; they are constitutionally impermissible.

Finally, the imposition of a grant maximum violates the congressional mandate that aid be furnished to all individuals eligible under the Social Security Act. The maximum can be seen as denying aid outright to certain members of eligible families or as conditioning the scope of eligibility on the size of the recipient family, in either case in violation of the Social Security Act.

I.

Imposition of the family maximum denies appellees the equal protection to which they are entitled under the Fourteenth Amendment.

A. *The family maximum divides public assistance recipients into two classes and imposes deprivations on those children in larger families.*

Appellees' basic contention, accepted by each of the five lower courts that have passed on the question, is that the family maximum violates the Equal Protection Clause of the Fourteenth Amendment because that maximum divides AFDC recipients into two classes and imposes deprivations on one of those two classes that lack rational relation to, and indeed frustrate attainment of, the central purposes of the Social Security Act, namely, the assistance of needy children and the preservation of the family unit.

In Maryland, any child born into a wholly penurious single-parent family already having five or more children will be denied assistance altogether. If one takes account of the fact that the $250 paid to such a family will be shared among its members, all members of such a family are denied assistance commensurate with their needs. Such deprivation is visited upon recipients falling within this

class, while assistance commensurate with state-determined needs is afforded others, because of the fact that the disfavored recipients live in larger families.[14] It is this distinction that appellees argue is without rational foundation.

B. *The Equal Protection Clause requires a rational justification for the deprivation imposed by the family maximum.*

To fulfill the constitutional command that "no State . . . shall deny to any person within its jurisdiction the equal protection of the laws," a state-imposed classification must "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U.S. 150, 155 (1896). It "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

This assurance of even-handed treatment reaches all governmental action, whether it be to impose limitations on individual conduct or to distribute public benefits. The notion that public benefits are "absolutely discretionary" and that therefore there "is no judicial review of the manner in which that discretion is exercised" (*Smith* v. *Board of Commissioners of the District of Columbia,* 259 F. Supp. 423, 424 (D.D.C. 1966)) has been thoroughly and finally repudiated. The protections of the Equal Protection Clause have been applied to shield public assistance recipients against the

[14] Or possibly because their needs are extraordinary, see note 11, *supra.*

imposition of: (1) durational residence restrictions, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); (2) the substitute-father rule, which deprived children of benefits because of their mothers' relationships, *Smith* v. *King*, 277 F. Supp. 31 (D. Ala. 1967), aff'd on other grounds, 392 U.S. 309 (1968); (3) denial to working mothers of benefits allowed to mothers with like unearned income, *Anderson* v. *Burson*, 300 F. Supp. 401 (N.D. Ga. 1968); (4) arbitrary variations in benefit levels between different areas within a state, *Rothstein* v. *Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969); and (5) the family maximum involved in this case and the related individual maximums involved in *Kaiser* v. *Montgomery, supra.*

C. A searching appraisal of the family maximum is required because of the fundamental importance of public assistance, the powerlessness of AFDC children, the effect of the maximum on the maintenance of an intact family unit and the classification of children based on parental conduct over which they have no control.

1. The challenged classification affects the availability of the fundamental rudiments of human existence.

Not only is it clear that the benefits of the Equal Protection Clause are applicable to the receipt of public assistance benefits; in recent months it has become clear that governmental decisions affecting public assistance benefits fall in that class of cases calling for the most searching judicial appraisal. It has long been recognized that standards of judicial review vary depending on the situation involved and the interests, public and private, implied. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969); *Baxtrom* v. *Herald*, 383 U.S. 107 (1966) (jury trial); *Cox* v. *Louisiana*, 379 U.S. 536

(1965) (speech and assembly); *Carrington* v. *Rash*, 380 U.S. 89 (1965), and *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); and *Shapiro* v. *Thompson*, *supra* (interstate travel). It could scarcely be otherwise. The judiciary cannot discharge the responsibilities assigned to it by the Constitution by treating alike the allocation of subsistence rations and the licensing of pleasure boats. Recognizing the judiciary's peculiar responsibilities in dealing with decisions affecting an individual's basic livelihood, a three-judge district court in the Southern District of New York has stated:

> "It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting fundamental constitutional rights. Poverty is a bitter enough brew. It should not be made even less palatable by the addition of unjustifiable inequalities or discriminations. It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative." *Rothstein* v. *Wyman*, 303 F. Supp. 339, 347 (S.D.N.Y. 1969).

To similar effect is the court's analysis in *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), prob. juris. noted *sub nom. Goldberg* v. *Kelly*, 394 U.S. 970 (1969):

"Suffice it to say that to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." *Id.* at 900 (footnote omitted).

Appellees' right to the most searching judicial protection of their entitlement to even-handed allocation of public assistance benefits is based quite simply on the elemental importance of these benefits to them and of their consequent status as fundamental human rights. This Court has recognized the right to procreate as "one of the basic civil rights of man" for the obvious reason that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942). Consequently, "strict scrutiny of the classification which a State makes in a sterilization law is essential." *Id.* Similarly, this Court has dealt with "rights [that] involve the intimate, familial relationship between a child and his own mother" by noting that "we have been extremely sensitive when it comes to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Levy* v. *Louisiana,* 391 U.S. 68, 71 (1968).

More even than marriage and procreation, the ability to obtain food, clothing, and shelter is "fundamental to the very existence and survival of the race," *Skinner, supra.* It is clear beyond peradventure that the interests at stake in this action and the decision of this Court involve the basic rudiments of human existence. The maximum grant provides families with less than the amount necessary to purchase minimally adequate food, clothing, shelter, and utilities.

The Social Security Administration poverty index, considered by all experts to be the very lowest amount with which a family can provide for itself,[14] sets forth $5,090 as the income level for a nonfarm family of seven below which such a family is considered poor. Orshansky, *Counting the Poor: Another Look at the Poverty Profile,* in Poverty in America 67, 75 (Ferman, Kornbluh, and Haber, eds. 1968). (This is the familiar index setting forth a poverty line of $3,130 for a nonfarm family of four.) That income level is based on food prices as of January 1964; if appropriate adjustment is made for the increase in the consumer price index for food between January 1964 and September 1969, Economic Indicators, September 1969 at 26, the poverty level for a family of seven becomes $6,159. In contrast, the annual AFDC payments to families of seven (one parent and six children) under grant maximums in effect in the following States are: Maryland —$3,000; Alabama—$2,040; Utah—$2,952; Mississippi—$1,296; Arizona—$2,640; Georgia—$1,968; Wyoming—$2,680.

That the Court here deals with fundamental human rights emerges even more clearly if the abstraction of the family maximum is translated into the realities of appellee Williams' life:

"After payment of her monthly rent, and the cost for heating her home with coal, she has less than $175 per

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[14] For criticism of the index see Speth, Cotton, Bell, Mindus, *A Model Negative Income Tax Statute,* 78 Yale L.J. 269, 298 (1968); Friedman, *The Official Estimates Are Wrong,* in Poverty American Style 106, 109 (Miller, ed. 1966); Bureau of Social Science Research, Inc., Living Costs and Welfare Payments 34-36 (1969); The President's Commission on Income Maintenance Programs, Poverty Amid Plenty: The American Paradox 29-33 (mimeo Nov. 12, 1969).

> month to feed and clothe her family [of eight children], and to provide them with the other necessities of life. She is constantly forced to buy clothes and shoes for her children on credit, and she is already in serious debt. Most of her children need shoes right now, and they sometimes stay home from school, especially in the wintertime, because they do not have the necessary clothes to wear." Stipulation of Facts, Appendix at 72.

As to appellees Junius and Jeanette Gary and their eight children:

> "After paying the monthly rent of $75 and the gas and electricity bill, Mr. Gary has less than $150 to feed and clothe his family and to provide them with all the other necessities for the month. All of his children are in school and are constantly in need of clothes and shoes and money for other kinds of supplies. His gas and electricity is sometimes shut off, because he is unable to pay the bill. He is forced to buy clothing and shoes for his children on credit and he is constantly in debt as a result. Most of his children need shoes and clothing now and sometimes they have to stay home from school." Stipulation of Facts, Appendix at 74.

A Secretary of Health, Education, and Welfare testified earlier this year that:

> "I would make a categorical statement, although I have not counted them, that the overwhelming proportion of those 8 million people who are on welfare are malnourished. I can't come to any other conclusion after looking at how much money they get every month.

I don't see how those mothers can buy adequate milk and food for those children even if they had the knowledge for it." Testimony of Secretary Wilbur J. Cohen, *Hearings before the Senate Select Comm. on Nutrition and Human Needs,* 90th Cong., 2d Sess., part 2, at 356 (1969).[14a]

2. Those subject to the deprivation created by the family maximum comprise a politically impotent class requiring this Court's special protection.

Not only are appellees entitled to the Court's most exacting protection because of the character of the interest affected; such protection is also called forth "by the defenseless and disadvantaged state of the class of citizens [involved], who are usually less able than others to enforce their rights." *Rothstein* v. *Wyman,* 303 F. Supp. at 347. As this Court has recognized,

"prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny." *United States* v. *Carolene Products,* 304 U.S. 144, 153, n. 4 (1938).

[14a] The Maryland State Department of Social Services has itself reported the conclusion "that Baltimore has the unenviable distinction of being among the leading locales in the country in malnutrition (of children)." Maryland State Department of Social Service, Profile of Caseloads, Research Report No. 5 at 8 (1969). For more general information on malnutrition among welfare recipients, see *Hearings, supra,* at 614-15; Citizens' Board of Inquiry into Hunger and Malnutrition in the United States, Hunger, U.S.A. 28, 72 (1968); LeBeaux, *Life on A.D.C.: Budgets of Despair,* in Poverty in America 519, 523-26 (Ferman, Kornbluh, and Haber, eds. 1968).

A class comprising the poorest of the poor, consisting primarily of children, frequently stigmatized by race and illegitimacy in addition to their poverty, clearly qualifies as such a discrete and insular minority:

> "More than any other segment of society, the very lowest economic stratum is socially isolated. The poor man not only fails to comprehend society or his community, he is out of touch with it. He reads fewer newspapers, hears fewer news programs, joins fewer organizations, and knows less of the current life of either the community or the larger world than more prosperous, better educated people do." U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, *Low-Income Life Styles* 4-5 (1968).

As Michael Harrington concluded in his classic study, "the poor are politically invisible." Harrington, *The Other America* 13 (1962).[18]

The welfare poor are if anything even more isolated from the social and political life of the large community than are the poor as a whole:

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[18] "[T]he poor and racial minorities . . . are not always assured a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary." *Hobson* v. *Hansen*, 269 F. Supp. 401, 507-08 (D.D.C. 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

"[T]here are important differences between the very poor who manage to maintain themselves without public assistance and those who do not have the resources to achieve even a minimum level of economic independence. For example, negative public attitudes towards mothers who are dependent on AFDC tend to transfer to the mothers and their children, with an associated sense of failure, strong self-disparagement and hopelessness." U.S. Dept. of Health, Education and Welfare, Welfare Administration, Division of Research, *Growing Up Poor* 7 (1966).

And the most powerless of the poor, lacking even theoretical access to the political process through the franchise, are the children whose livelihood is here at issue:

"[O]f all groups among the poor it is children who have been most neglected and most shabbily treated by current social policies, despite the fact that of all population groups they are the most vulnerable." Burns, *Childhood Poverty and the Children's Allowance,* in Children's Allowances and the Economic Welfare of Children 3 (Burns, ed. 1968).

3. The challenged classification interferes with the maintenance of an intact family unit.

By refusing to recognize the needs of families with large numbers of children unless some of the children are removed from the parental home, the Maryland grant maximum and its counterparts in other states undermine the fundamental right of certain relatively intact families to remain intact. "In effect, Maryland impermissibly conditions . . . eligibility for benefits upon the relinquishment

of the parent-child relationship." *Williams* v. *Dandridge*, 297 F.Supp. at 459.[16] Such a result furnishes an additional reason for this Court to subject the classifications created by the challenged regulation to the closest possible judicial scrutiny.

This Court has long recognized the fundamental right of a parent to bring up his children: *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) ("liberty" in the Fourteenth Amendment's Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to acquire useful knowledge, to marry, establish a home, and bring up children . . . "); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder."); *Poe* v. *Ullman*, 367 U.S. 497, 543, 551-52 (1961) (Harlan, J., dissent) (the home is "the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." The integrity of the family unit is one of those interests that "require particularly careful scrutiny of the state needs asserted to justify their abridgment."); *Griswold* v. *Connecticut*, 381 U.S. 479, 482-84 (1965); and *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968), reh. den. 391 U.S. 971.

Family integrity has been protected not only against gross forms of state intervention, but also against state

[16] See also *Dews* v. *Henry*, 297 F. Supp. at 592.

action that erodes this "basic civil right" of the "intimate family relationship," through the denial of benefits or opportunities on a discriminatory basis. In *Levy* v. *Louisiana, supra,* this Court invalidated a state statute that had been construed to deny wrongful death benefits to illegitimate children; in *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967), this Court struck down a racial barrier to marriage, "one of the basic civil rights of man." Since Maryland and 22 other states in constructing their AFDC grant levels have sought to induce family separation and penalize maintenance of the integrity of the family unit, the justifications for such actions must undergo the most rigorous scrutiny.

4. The family maximum creates classifications of children based on conduct of their parents over which they have no control.

The effect of an AFDC grant maximum is to penalize certain needy dependent children not because of any conduct of their own, but because of their status as members of a large family. Classifications embodying discriminations based on personal characteristics over which an individual has no control—such as race,[17] alienage,[18] indigence,[19] and, most recently, illegitimacy[20]—have been regarded by this Court as inherently suspect and as calling forth "the most rigid scrutiny." *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944).

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[17] *E.g., Monroe* v. *Bd. of Commissioners,* 391 U.S. 450 (1968); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Brown* v. *Bd. of Education,* 347 U.S. 483 (1954).

[18] *E.g., Oyama* v. *California,* 332 U.S. 633 (1948).

[19] *E.g., Harper* v. *Virginia Bd. of Elections, supra; Douglas* v. *California,* 372 U.S. 353 (1963); *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

[20] *Levy* v. *Louisiana, supra.*

In the context of the statutory right to recover for the wrongful death of a parent, this Court has concluded that "it is invidious to discriminate against [illegitimate children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother." *Levy* v. *Louisiana*, 391 U.S. at 72 (footnotes omitted). The same rationale must apply to the statutory right to receive AFDC assistance: It is invidious to discriminate against certain innocent children "when no action, conduct or demeanor of theirs is possibly relevant" to their need. It is particularly invidious in light of the fact that "protection of such [dependent] children is the paramount goal of AFDC." *King* v. *Smith*, 392 U.S. at 325.[21]

Because this Court is here concerned with "the last resource of those bereft of any alternative," *Rothstein* v. *Wyman*, 303 F. Supp. at 347, because those who receive that resource are among the most politically impotent members of our society, because the right to maintain an intact family is being threatened or penalized, and because children are being burdened for reasons over which they have no control, the "cruelties and anomalies" that appellants admit result from imposition of a maximum grant (Brief for Appellants at 37) must be subjected to the most searching possible judicial examination. Such an inquiry, even considering the proffered justifications for the challenged classification, must inevitably lead to the conclusion that appellees and the class they represent are being denied the equal protection of the laws.

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[21] "The present scheme penalizes some recipients but not others on the basis of circumstances which are beyond the control of the recipients and have no rational relationship to the purpose of the AFDC program." *Kaiser* v. *Montgomery*, unreported opinion at 7.

D. *Limiting public assistance by imposition of the family maximum denies appellees equal protection.*

Whether tested by the criteria generally applicable under the Equal Protection Clause or the more stringent criteria that *amici* urge are appropriate, the imposition of family maximums denies those disadvantaged by it the equal protection of the laws guaranteed them by the Fourteenth Amendment.

The dual purposes of Title IV of the Social Security Act of 1935, as amended, 42 U.S.C. §§601-644 (1968)[22] and of the various state implementing statutes,[23] are distinct but complementary: assuring the basic necessities of life to needy dependent children and their caretakers and

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[22] "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection ..." Social Security Act §401, 42 U.S.C. §601.

[23] The Maryland statute, closely paralleling the federal Act, sets forth the purpose of AFDC as being

> "the strengthening of family life through services and financial aid, whereby families may be assisted to maximum self-support in homes meeting the requirements for child care established by law in this State." Ann. Code of Md., Art. 88A, §44A.

The statute goes on to provide that

> "The amount of assistance which shall be granted for any dependent child . . . shall be sufficient, when added to all other income and support available to the child, to provide such child with a reasonable subsistence compatible with decency and health." Ann. Code of Md., Art. 88A, §49.

Other statutes are similar. See, *e.g.*, Maine R.S.A. §3741 (Supp. 1968-69); Cal. Welfare & Insts. Code §11205.

strengthening the family unit in which such children are being raised.

Elaborate argument is hardy required to establish that family maximums and the distinction they imply bear no rational relation to the purpose of providing basic financial protection to needy dependent children, which this Court has recognized as "the paramount goal of AFDC." *King* v. *Smith*, 392 U.S. at 325. Nothing could be more obvious than that a classification that results in fulfilling the needs of some children and families while ignoring to a greater or lesser extent the needs of other equally needy and equally dependent children and families bears no relation to the statutory purpose of aiding these children and their caretakers. Had one of the "excess" Williams or Gary children been born into a smaller family, he would have received assistance of $79 per month.[24] Instead, he receives no public assistance in his own right. Moreover, there is no suggestion that such denial reflects a state's determination that he receives nothing because he is not in need. The very function of the family maximum is to limit public assistance to an amount less than state-determined need. It would be absurd to suggest that the evil of need and dependency is "most felt"[25] in small, rather than large, families, and

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[24] If over 12 years of age; $65 per month if six through twelve years of age. *Williams* v. *Dandridge*, 297 F. Supp. at 453-54.

[25] In the field of economic regulation, this Court has often been tolerant of underinclusiveness in the coverage of regulatory statutes, in recognition of the legitimacy of a legislative decision to attach an evil "where experience shows it to be *most felt*," *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224, 227 (1914) (emphasis supplied). See also, *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 400 (1937); *Mutual Loan Co.* v. *Martel*, 222 U.S. 225, 235-36 (1911). Such cases are wholly inapposite when the state has assumed the obligation of fulfilling

is increasingly less severe as family size increases; yet small families have their needs met while large families receive amounts that are arbitrarily lower than their need and that fall progressively further below such need as the size of the family increases. The benefited class is thus "underinclusive" by virtue of its failure to include all those similarly situated with respect to the statutory purpose of aiding needy dependent children,[20] a defect that establishes "a *prima facie* violation of the equal protection requirement of reasonable classification," Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 348 (1949).

The Georgia welfare regulation that denied aid to a person employed full time regardless of his income but provided assistance to needy persons employed part time was found void for underinclusion by reasoning directly applicable to the instant case:

> "[T]he . . . regulation . . . violates plaintiffs' constitutional rights established by the equal protection clause of the Fourteenth Amendment to the Constitution in that, although plaintiffs are as needy as other recipients of assistance . . . , the regulation operates to the finan-

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the subsistence needs of the entire class of needy dependent children, and, indeed, is required by federal law to extend assistance to all who meet the eligibility requirements of need and dependency. 42 U.S.C. §602(a)(10) requires that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." See *King* v. *Smith*, 392 U.S. at 317, 333, in which the provision is referred to as 42 U.S.C. §602(a)(9).

[20] Underinclusion has been defined as occurring "when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated." *Developments in the Law, supra*, 82 Harv. L. Rev. at 1084.

cial disadvantage of plaintiffs on . . . a basis which bears no reasonable relationship to plaintiffs' financial needs and therefore to the purposes of the Social Security Act." *Anderson* v. *Burson*, 300 F. Supp. at 404.

In short, the family maximum creates a distinction between needy dependent children in small families and equally needy dependent children in large families and deprives children in the latter. It thereby creates a discrimination bearing no rational relation to the primary purpose of the AFDC program: the relief of need among all dependent children.

The maximum grant is equally subversive of the AFDC program's other principal goal: "to help maintain and strengthen family life," 42 U.S.C. §601. The rationale of this statutory purpose has been expressed by the Department of Heath, Education, and Welfare as follows:

> "To live in the family to which he belongs is the foundation of a child's security. The public has an interest and an obligation in sustaining the contribution which parents and immediate family make to the development of a child. Financial inability to meet a child's needs, therefore, should not be allowed to force a parent to surrender responsibility for bringing up the child.
>
> "The assumption underlying the aid to dependent children program is that when a family circle is broken or incomplete, or parents are handicapped by physical or mental disability, the measure most conducive to the child's welfare is the strengthening of the home against the financial impact of these lacks or losses and to give

his parent, or other relative, a chance to gain or re-establish control over his affairs." *Handbook of Public Assistance Administration*, Part IV, §3401.[27]

Far from strengthening family life, the maximum encourages family dissolution. Because eligibility for AFDC is extended to a child living in the home of any one of a number of relatives other than his parents, 42 U.S.C. §606(a)(1), the effect of the maximum can be avoided and a grant based on need can be received if some of a family's children are removed from their original home and placed in the home of an eligible relative. As illustrated in the opinion of the court below:

> "If Mrs. Williams were to place two of her children of twelve years or over with relatives, each child so placed would be eligible for assistance in the amount of $79.00 per month, and she and her six remaining children would still be eligible to receive the maximum grant of $250.00. If Mr. and Mrs. Gary were to place two of their children between the ages of six and twelve with relatives, each child so placed would be eligible for assistance in the amount of $65.00 per month, and they and their six children would still be eligible to receive the maximum grant of $250.00." *Williams* v. *Dandridge*, 297 F. Supp. at 453-54.

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[27] The following excerpt from the legislative history of the Social Security Act bears out the Department's interpretation of statutory purpose:

> "[I]t has long been recognized in this country that the best provision that can be made for families of this description [without a potential breadwinner] is public aid with respect to dependent children in their own homes." H.R. Rep. No. 615, 74th Cong., 1st Sess., at 10 (1935).

The pressure thus so obviously exerted upon the integrity of the AFDC family trenches upon rights of constitutional as well as statutory origin. The value placed upon the maintenance and integrity of families by the Social Security Act is but one reflection of the central position of the family in our structure of values, a position protected by Constitution as well as statute. Marriage and the family are associations protected against governmental interference by the First and Fourteenth Amendments. See, *inter alia, Skinner* v. *Oklahoma, supra; Pierce* v. *Society of Sisters, supra; Griswold* v. *Connecticut, supra.* The right of man to marry and have children is among the "basic civil rights of man . . . fundamental to the very existence and survival of the race." *Skinner* v. *Oklahoma,* 316 U.S. at 541. The state may not unreasonably or arbitrarily interfere with the integrity of the family. Even more clearly, the state may not impose discriminatory regulations upon family associations, exerting disintegrating pressures upon those which the state, in its wisdom, deems too large. *Cf. Loving* v. *Virginia, supra; Sherbert* v. *Verner,* 374 U.S. 398 (1963).

In sum, the imposition of a family maximum constitutes a *prima facie* denial of equal protection because it deprives children living in larger families of subsistence afforded to similarly situated, equally needy children living in smaller families. This distinction, based on the size of the family unit, bears no rational relation to the principal purposes of the AFDC program: (1) the relief of childhood need and (2) the strengthening of the family. Indeed, the practice affirmatively frustrates the strengthening of the family by forcing a mother to choose between surrendering some of her children or depriving all of them.

This coercive pressure not only flaunts clearly enunciated federal statutory policy; it also trenches upon the constitutionally protected integrity of the family association by discriminatorily exerting disintegrating pressures on larger families.

E. *The proffered state interests fail to justify the imposition of family maximums.*

Amici now turn to consideration of appellants' justifications for the family maximum, in the following order of increasing plausibility and decreasing acceptability: (1) the family maximum is a work incentive, (2) the family maximum discourages desertion, (3) the family maximum is a birth-control measure, (4) the family maximum saves funds, and (5) the family maximum is necessary to please Maryland's electorate. But first we pause for a few preliminary comments on the nature of the justification required when a practice is challenged under the Equal Protection Clause.

First, to justify a distinction, one must advert to legitimate governmental policy considerations that justify disparate treatment of the classes created by the distinction. To say that there is a reason, other than pure disdain for the disfavored class, for the disparate treatment is not to justify the distinction. There is a reason, other than simple group hatred, for most denials of equal protection. What is required is a justification for the distinction, that is, a difference between the classes that corresponds with, that justifies the disparate treatment. To do this, the classes distinguished must have different objective characteristics relevant to the policy being implemented. If the reason advanced to justify imposition of disadvantage on

a class also applies to the class being favored, no justification is afforded for the distinction. Similarly, if the reason advanced to justify the imposition of disadvantage is applicable to only a small fraction of the disadvantaged class, the line of demarcation between the favored and disfavored classes is not justified, but rather some other line of distinction between the small fraction of the disadvantaged class and whoever falls into the other class.

Second, the justification advanced must be the actual policy pursued by the legislature or administration rather than an afterthought displayed to mask an attempt at invidious discrimination. If a state in fact seeks to discriminate on a racial basis and disguises this attempt, a court would not hesitate to strike down legislation upon evidence of its true motivation. Particularly is this the case where the later-discovered purpose is not attributed to the legislature by direct evidence but only by inference from the statute, and where the fit between the proffered purpose and the actual effect of the statute is imperfect.

Third, the policy advanced must be legitimate. It must be a policy that the state can constitutionally pursue. Thus we cannot justify an apparently racially discriminatory policy by invoking justifications that betray an effort to suppress freedom of speech. In this case, one cannot advert to a state policy that is inconsistent with the purposes of the Social Security Act. In making funds available to the states for public assistance purposes, the federal government meant to attain certain purposes. In administering public assistance, states must observe these policies.

1. Family maximums provide a work incentive.

Appellants place principal reliance on their argument that the family maximum "provide[s] an incentive to employment not present in states not imposing maximums by allowing recipients to retain earnings in excess of the grant." Brief for Appellants at 32. Appellants apparently see a work incentive in the family maximum in that a family a member of which earns $200 a month and has state-determined needs of $350 a month in a state with a maximum grant of $250 a month will be entitled to keep $100 of the $200 earned, and thus the working member has an incentive to work. What seems to have escaped appellants is that the incentive to which they refer derives not from the imposition of the family maximum, but from the fact that the recipient is permitted to retain funds in excess of the maximum. Thus in *Dews* v. *Henry, supra,* the state of Arizona subtracts earnings from the family maximum, not from the level of need. More serious is the fact that the same incentive can be achieved without reference to the family maximum by permitting recipients to retain some portion of their earnings over and above their need-determined grant, which states must now do pursuant to the Social Security Act.[28] In short, the incentive to work that results from allowing a recipient to retain earnings has nothing to do with the family maximum and hence cannot serve as a justification for that practice.

a. The work-incentive justification applies equally to persons not affected by the family maximum.

The manner in which the family maximum does operate to provide an incentive is by limiting the amount of as-

[28] See subpart c., *infra.*

sistance payable to a family to some level below subsistence. Obviously if a person is confronted with the choice between employment and receiving less than subsistence, incentive to find employment will be greater than if his alternative is some form of subsistence provision. But this incentive effect cannot serve to justify the family maximum, for it does not explain why parents of large families should be subjected to such coercion while those of smaller families are exempt. Clearly the state has no grounds for pressuring into employment adult members of large families while not so pressuring persons in small families. As a justification for the family maximum, the reason assigned is underinclusive. It does not distinguish between the classes involved.

Nor can comparison between Maryland's family maximum and some imaginary paradigm situation involving the federal minimum level of wages serve to justify the family maximum as a work-incentive device. Equalization of the maximum payable in welfare benefits with such level would serve no work-incentive purpose capable of serving as a justification for the family maximum. First, the fact is that on a national basis there is no such correspondence between family maximums and minimum wages. As is indicated in Table 2, *supra,* family maximums range from $108 per month in Mississippi to $353 per month in Oklahoma. Second, the employment pattern typical of AFDC recipients is not represented by the federal minimum-wage paradigm, but is rather characterized by part-time employment consonant with a mother's domestic duties and employment in fields such as domestic service and agriculture, which are exempt from federal minimum-wage legislation. Thus most employment opportunities produce a

level of income lower than that represented by full-time employment at the federal minimum wage. An effective deterrent to reliance on welfare benefits would therefore require benefit levels far lower than those equivalent to the federal minimum wage.

b. *The work-incentive justification is of relevance to only a small portion of those persons subject to the family maximum.*

Not only is the work-incentive justification insufficient because it applies as well to smaller families and so renders the family-maximum category underinclusive; it also fails because only a small portion of AFDC recipients are employable, free enough of domestic responsibilities to seek employment, and have employment opportunities, thus exposing the majority of large AFDC families to primitive incentives to which they are unable to respond.

Indeed, Maryland acknowledges the unsuitability of most AFDC mothers for work:

> "In the typical mother-headed family receiving AFDC, the mother who is in the home is not working. About 7% of mothers are employed, but their earnings, whether full-time or part-time are below assistance standards so that the family remains eligible on financial need. About 15% of the remaining mothers are physically or mentally incapacitated for employment, and another 11% are noted as having no marketable skills or employment is not available for the kind of work they have done in the past. Fully one-third are noted as being needed in the home full-time to take care of infants or children with various problems such that employment is not feasible if value is placed on child

care. The remaining one-third could be trained or placed in the labor market to varying degrees if day care needs were met." Maryland Dept. of Social Services, *Profile of Caseloads,* Research Report No. 5, at 6 (1969).[20]

In part, as Maryland has recognized, unavailability for employment stems from the pressure of domestic duties:

> "For the *ADC mother,* the proper care of children is the primary consideration. Significant for this consideration are those factors that clarify the availability and adequacy of a plan for the care of children; the ability of the mother to work and continue to be responsible for the care of the child in his day by day living, and the effect that the children's ages, health, and behavior have on the mother's earning capacity. No one decision is to be sought, but the regard for the value of employment to an individual and the participation of the mother in determining her earning capacity need to be part of each decision.
>
> "An examination with the mother of the factors that are pertinent in her situation will provide the basis for the Department's decision relative to resource in earning capacity. For some mothers, the size of the family will be the factor that determines inability to give

[20] "Moreover, the more children a woman has, the shorter her work life will be, on the average, because of the recurring interruption to continuous work or because of extended withdrawal from the labor force . . . [T]he birth of each additional child further reduces the average work life expectancy by from 2 to 3 years." Perrella, "Women and the Labor Force," *Monthly Labor Review* (U.S. Dept. of Labor), Feb. 1968, p. 3.

children care and to work. For other mothers, the living arrangement will be the factor that determines whether or not there is a resource in earning capacity." State of Maryland, Manual of the Dept. of Public Welfare §215.19 (superseded Nov. 1, 1968; emphasis in the original).[30]

In part, unavailability stems from the inferior educational and work experience of AFDC mothers:

"With regard to employability, about one-half of the mothers had education up to the second year of high school. Only 16% graduated from high school and the remainder have only a grade school education of various levels. Twenty-two percent of the mothers never held employment before receiving assistance and of the remainder, the vast majority were domestic workers or unskilled workers in various manufacturing or service industries. Where mothers had worked in the past, the average time span of last employment was less than 2 years. Also for this group, it had been 2.8 years since they last held employment—just about equal to the average length of time of receiving assistance as noted above." *Profile of Caseloads* at 6-7.

In part, the unemployment of AFDC mothers stems from the lack of employment opportunities. As of May 1966 the Maryland State Employment Service estimated that there were 18,760 jobs available in the Baltimore area. At the same time, there were 26,000 unemployed persons actively seeking employment. Appendix at 153.

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[30] This provision has been superseded by regulations adopted under the WIN program, described in subpart c., *infra*.

In short, the family maximum cannot be justified as an employment incentive where only a minority of the persons affected by it are susceptible of responding to such an incentive. The justification is too narrow for the category to be justified. Thus the work-incentive argument fails to explain the classes created by the family maximum. It is at once too broad and too narrow. It fails of congruence with the distinction so completely as to cast doubt on its relevance. As the court below put it,

> "the evidence before us at the original trial was crystal-clear that the only reason why the maximum grant regulation was continued was financial, *i.e.*, that the Governor and General Assembly of Maryland had failed to appropriate sufficient funds to finance the cost of AFDC . . . ." 297 F. Supp. at 467 (1968).

e. Congress has mandated highly selective work incentives and requirements inconsistent with and preemptive of work-incentive devices that coerce the employable and unemployable alike.

A Work Incentive Program (WIN) for recipients of AFDC, mandatory on all states, was included in the 1967 Amendments to the Social Security Act.[21] The WIN provisions, described in greater detail below, were supplemented with a requirement that states furnish child-care services for the children of those referred to employment or training[22] and with a requirement that states exempt part of

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[21] P.L. 90-248, 81 Stat. 821, 42 U.S.C. §§602(a)(15), (19), 630-639 (Supp. III, 1969). See also U.S. Dept. of Labor, Work Incentive Handbook (1968); U.S. Dept. of Health, Education, and Welfare, Guidelines for the Work Incentive Program (1969); 45 C.F.R. §220.35, 34 Fed. Reg. 1357 (Jan. 28, 1969).

[22] 42 U.S.C. §602(a)(15)(B)(i).

the recipient's earnings from consideration in computing the amount of the family's grant.[33] The intent of Congress in enacting the WIN provisions was "[t]o give greater emphasis to getting *appropriate* members of families drawing aid to families with dependent children (AFDC) payments into employment";[34] indeed, "certain classes of persons for whom any referral would be inappropriate are specifically enumerated."[35] Congress recognized that the employment potential of AFDC recipients

> "can be realized only with careful planning and with the development of appropriate training, educational, child care, and related resources on the part of the State and local welfare agency."[36]

There are a number of critical respects in which the operation of the WIN program differs from that of a grant maximum as a work incentive. At the outset, those referred to the WIN program must be "appropriate" for referral;[37] certain classes of individuals are specifically

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[33] 42 U.S.C. §602(a)(8)(ii), 602(a)(19)(E)(ii), 634. This "work incentive" differs from a grant maximum in that it rewards the person who works with a total income above minimum subsistence, as opposed to punishing nonworkers by paying only a fraction of subsistence. It is true that persons receiving less than full need as determined by the State of Maryland may retain earnings without diminution of benefits. This was not the case in Arizona, *Dews* v. *Henry*, 297 F.Supp. at 590, and was true only to the extent of $50 in Maine. *Westberry* v. *Fisher*, 297 F.Supp. at 1113.

[34] H.R. Rep. No. 544, 90th Cong., 1st Sess. 3 (1967) (emphasis added).

[35] H.R. Rep. No. 1030 (Conference Report), 90th Cong., 1st Sess. 58 (1967).

[36] H.R. Rep. No. 544 at 97.

[37] 42 U.S.C. §602(a)(19)(A)(i), (ii), and (iii).

exempted from the referral provision[38] and individual determinations are to be made in all other cases. Unlike the assumption, which underlies the grant maximum, that a recipient will be able to find employment on his own, the congressional approach is to require the Secretary of Labor to provide testing and counseling to all those appropriate persons referred to the WIN program and to determine whether they are suitable for regular employment, for institutional and work-experience training, or for special work projects.[39] Participants are assured that appropriate health and safety standards are followed at the work or training project to which they are referred, that prevailing wages will be paid, that working conditions are reasonable, and that workmen's compensation protection is provided.[40] Participants whose relocation is necessary to their permanent employability may, if they wish, obtain assistance in relocating.[41] Work or training may be refused for good cause, and if refused without good cause, intensive counseling is provided.[42]

Congress required administrative fairness at critical stages of the referral process. First, an individual dissatisfied with the determination that he is appropriate for referral has the right to an administrative hearing before

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[38] 42 U.S.C. §602(a)(19)(A)(iv)-(vii). Among those exempted are those suffering from illness or incapacity; those living remote distances from any employment or training to which they could be referred; and those whose continuous presence in the home is required because of the illness or incapacity of another member of the household.

[39] 42 U.S.C. §633(a).

[40] 42 U.S.C. §633(f).

[41] 42 U.S.C. §637.

[42] 42 U.S.C. §602(a)(19)(F).

the state welfare agency.[43] Second, the Secretary of Labor must provide a hearing to determine whether an individual refused without good cause to accept employment or participate in training.[44] All these provisions reflect a congressional determination that providing a work incentive for AFDC recipients is a complex matter, requiring a particularized approach.

Like all other states, Maryland has adopted the necessary enabling legislation[45] and implementing regulations[46] for a full-fledged work incentive program. Maryland now refers appropriate people for training, employment, or special work projects, and terminates the aid of any adult who after sixty days of counseling refuses to participate without good cause. The state also allows the retention of a substantial share of earnings for persons on AFDC. The state has not sought repeal of the Work Incentive Program, nor has it decided to forego federal funding so that it may operate a public assistance program free of the Work Incentive Program.

Whatever its effect as a crude starvation incentive for adult AFDC recipients to seek employment, the primary effect of a grant maximum is to penalize needy dependent children. Congress has now determined that employment of AFDC recipients must be dealt with through a combination of counseling, training, and positive cash rewards rather than punishment of children. The WIN amend-

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[43] H.E.W. Guidelines §42.

[44] 42 U.S.C. §633(g); Work Incentive Program Handbook §412-H-K.

[45] Ann. Code of Md., Art. 88A, §17.

[46] State of Maryland, Manual of the Department of Social Services, Rule 200-IX.

ments expressly proscribe denying public assistance to children living with an adult who refuses to cooperate with the employment procedures contemplated.[47] While such an adult's needs are not considered in computing the amount of the grant (and that only after lengthy counseling), payments must be made on behalf of the rest of the family. Maryland, on the other hand, seeks to justify its denial of aid to children in large families as a measure to force adults into employment. In so doing, it places the family maximum, as a work-incentive program, in direct conflict with the Social Security Act both by utilizing an unselective, blindly overreaching deprivation to force employment out of employable and unemployable alike and by using that very method—denial of aid to children—that the Act proscribes. As this Court said in *King* v. *Smith*, 392 U.S. at 325:

> "Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children and that protection of such children is the paramount goal of AFDC."

So also here, Maryland may not punish children to provide employment incentives to their parents, most of whom are not in a position to accept employment.

2. Family maximums deter desertion.

Appellants urge that family maximums are justifiable because they deter desertion of families by their fathers; that is, that a father contemplating desertion will be less

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[47] 42 U.S.C. §602(a)(19)(F); 45 C.F.R. §220.35(a)(6), 34 Fed. Reg. 1357 (Jan. 28, 1969).

likely to do so if the consequence of desertion is utter destitution for his family rather than a subsistence existence. The forces that allow a man to desert his family or constrain him from doing so are exceedingly complex and powerful. Whether the differential between a family maximum grant and one commensurate with state-determined need plays a significant role in this highly charged decision is dubious. Indeed, many if not most parents in this situation are likely wholly unaware of the existence of the family maximum. What little evidence is available indicates that Maryland's highly touted marital adhesive is of negligible sticking power. States without family maximums report that 3.9 per cent to 35.7 per cent of their AFDC clientele result from desertion, whereas states invoking the family maximum experience a desertion ratio ranging from 8.3 per cent to 26.6 per cent.[48]

Apart from such demonstrable inefficacy, Maryland's desertion-deterrence rationale is afflicted with the same deficiencies as its work-incentive rationale. If grants below subsistence deter desertion, why are comparable limitations not imposed upon smaller families? Surely the state cannot credibly profess disinterest in desertion of smaller families. Conversely, why subject AFDC families where the father is dead or disabled to the desertion disincentive? To them, the "deterrence" is cruelly irrelevant. Thus as with Maryland's work-incentive argument, the state seeks to justify the family maximum by adverting to policy justifications that call for like treatment of smaller families and are of relevance to only a fraction of those disfavored

[48] U.S. Dept. of Health, Education, and Welfare, Division of Program Statistics and Analysis, Characteristics of Families Receiving AFDC, Nov.-Dec. 1961, Table 12 (Apr. 1963).

by the policy. The policy fails to justify because it implies restrictions broader and narrower than the class to which the family maximum applies.

Also like Maryland's work-incentive rationale, the desertion-deterrence theory suffers from the defect of penalizing children, the intended beneficiaries of AFDC, for the conduct of their parents. As noted by a three-judge district court in invalidating a three-month waiting period for receipt of AFDC that had been defended as a means of "keeping families together": "This legitimate interest is clearly promoted by means impermissible under the federal Act, because it postulates deprivation of the children as the club to keep the parents together." *Damico* v. *California,* —— F. Supp. —— (Civ. No. 46538, N.D. Cal., opinion filed Sept. 12, 1969), unreported opinion at 7.

Moreover, the state of Maryland does not lack deterrents designed in fact to deal with the problem of desertion. Article 27, Sections 88-90 of the Maryland Code provide civil and criminal sanctions, ranging up to incarceration for a period of three years, to deter parents from deserting their children. Just as the WIN program provides Maryland with a specific, detailed program to cope with unemployment among welfare recipients, so the Maryland Code contains provisions designed to deal with desertion, the particularity and sophistication of which expose the speciousness of Maryland's claim that the family maximum constitutes a desertion deterrent.

Finally, there is the fact that Maryland permits the parents to avoid the effect of the family maximum by placing children with other relatives capable of affording a home eligible for AFDC. If one is to traffic in specula-

tions—they are not more—concerning the impact of AFDC benefit regulations upon a man desperately contemplating desertion, what effect will knowledge of these possibilities for avoiding the family maximum have? Will the coldly calculating, fully informed deserter take cognizance of such possibilities and desert as readily as though there were no family maximum? Is this what is indicated by the desertion figures mentioned at the outset, or do those statistics rather indicate ignorance of the entire problem? In any event, they do indicate that desertion is little affected by the presence or absence of a family maximum.

3. The family maximum as family planning.

Appellants urge that the family maximum may be justified as a birth-control device. Without repeating demonstrations earlier attempted, we note in passing difficulties of overinclusion and underinclusion. Why is it that birth control takes hold at the sixth and subsequent children, while the fecundity that begat the first five is so easily forgiven?

Even more objectionable than the slippage between means and end is the illegality of the means. However urgent or desirable the limitation of population, one may not lawfully pursue that end by punishing the offspring one wishes were not born. Such a practice would be no more justifiable than the attempted deterrence of extramarital sexual relations condemned on constitutional and statutory grounds in *King* v. *Smith, supra.* As this Court stated in striking down the substitute-father rule,

> "In sum, Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish depen-

dent children, and that protection of such children is the paramount goal of AFDC. . . . [I]t is simply inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children. . . . [T]he method it has chosen plainly conflicts with the Act." 392 U.S. at 325-27.

So also is it inconceivable that a state may, consistently with the Social Security Act, deny public assistance to children to prevent their parents from further procreation. The means chosen to effect the purpose plainly conflict with the Social Security Act. While 42 U.S.C. §602(a)(15)(A)(ii) endorses the adoption of a state plan looking to reducing the incidence of *out of wedlock* births, §602(a)(15)(C) plainly provides "that the acceptance by such child, relative or individual of family planning services provided under the plan shall be voluntary . . . and shall not be a prerequisite to eligibility for or the receipt of any other service or aid under the plan." Just as Alabama was precluded from sacrificing protection of dependent children to deter illegitimate births, so *a fortiori* is the state of Maryland precluded from sacrificing AFDC children to deter legitimate births. Indeed, under the Social Security Act, a state may not deny aid to even the person at whom the birth-control practices are aimed, much less deny aid to a child whose role is merely that of a pawn in the state's game to influence his parent. Surely, to permit family maximums with their implicit denial of aid to children, while proscribing termination of the adult whose fecundity is at issue, would be absurd.

Indeed, even were the Social Security Act's preemptive disapproval of coercive family planning not so clear, a

state could not constitutionally punish a child to influence his parents' behavior. Surely all would agree that, morally speaking, such practice would be a barbaric atavism, and, constitutionally speaking, such practice would reek with overtones of corruption and attainder long anathema to our constitutional tradition. As this Court put the point in *Levy* v. *Louisiana, supra*:

> "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." 391 U.S. at 72.

The right to freedom of choice in procreation is clearly a constitutional right. *Griswold* v. *Connecticut, supra; cf. Skinner* v. *Oklahoma, supra.* States are forbidden to withhold payment of benefits because of the exercise of a constitutional freedom. *Sherbert* v. *Verner, supra; Shapiro* v. *Thompson, supra.* See, in general, *Shelton* v. *Tucker,* 364 U.S. 479 (1960), and cases cited. Particularly is such discrimination patently wrong under a statute designed to aid mothers in the best interests of the child.

4. The family maximum is necessary to save funds and please voters.

When the Maryland family maximum was first challenged, the state of Maryland dealt more simply (and perhaps more frankly) with the problem of justification for the family maximum. See opinions below. Its purpose was to save money and please the electorate. However plausible these statements of purpose, they are plainly unacceptable as constitutional justifications. Any limitation, any deprivation of a class of public assistance recipients will save money,

which may be spent on other recipients or on monuments to public greatness. The question is not whether a distinction saves money.[49] All deprivations of public assistance save money, however blatantly discriminatory. The question relevant to equal protection analysis is whether the deprived class differs in any meaningful sense from the favored class. To this question, no answer is provided by the observation that more money would be spent if the deprivation were removed.

Similarly, what pleases the electorate can hardly be determinative of equal protection challenges. Unhappily, some electorates prefer discrimination of the most blatant and invidious sort. Indeed, it is just such preferences that the Equal Protection Clause calls upon the judiciary to repudiate.

II.

Establishment of an arbitrary ceiling on the amount of an AFDC grant violates the Social Security Act.

It has been made clear by this Court that "any state law or regulation inconsistent with [the] federal terms and conditions" upon which federal funds are disbursed to the state "is to that extent invalid." *King* v. *Smith*, 392 U.S. at 333, n. 34. In establishing in Point I that a number of the purposes for the maximum grant proffered by the state (work incentive, family planning, desertion disincentive) were not rationally achieved by the classification at issue,

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[49] See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. at 633; *Westberry* v. *Fisher*, 297 F. Supp. at 1114-15; *Dews* v. *Henry*, 297 F. Supp. at 592; *Kaiser* v. *Montgomery*, unreported opinion at 7; *Rothstein* v. *Wyman*, 303 F. Supp. at 348.

we necessarily demonstrated that those purposes were being achieved in a manner forbidden by the Social Security Act. Of course this violation of federal mandate constitutes an independent statutory ground for decision. We shall in this section explore one further ground considered by the court below and certain statutory defenses raised by appellants.

A. *The maximum grant violates the statutory command that aid shall be given to all eligible individuals.*

The Social Security Act requires that a state plan for AFDC "provide . . . that aid . . . shall be furnished . . . to all eligible individuals." 42 U.S.C. §602(a)(10).[1] The establishment of a maximum on the grant an AFDC family may receive, unrelated to its need, violates the statutory mandate in one of two ways: It denies assistance to eligible children whose needs raise the family need above the level of the maximum and which are therefore not considered in determining the amount of the grant, or it conditions the scope of eligibility of each family member on the number of individuals in the recipient family.

First, the imposition of a grant maximum results, for example, in no payment whatever being made on behalf of the fifth child in a family living in Delaware (indeed, the fourth child receives only $1) or in Georgia and in no payment being made on behalf of the sixth child in a family living in Alabama, Maryland, or Tennessee. Similar results obtain in the other states that impose grant maximums. Nothing, however, in the Act's definition of "dependent child" or in any other provision of the Act relates eligibility

[1] See *King* v. *Smith*, 392 U.S. at 317, 333, in which the provision is referred to as 42 U.S.C. §602(a)(9). (It was so numbered prior to the enactment of the 1967 Social Security Amendments.)

for AFDC to the number of persons in an individual's family. Clearly, the fifth or sixth child in a given family is as deprived of parental support as is the second; yet the effect of the grant maximum is to ignore his existence and to deny his eligibility. The maximum grant regulation is thus a clear violation of the congressional mandate that AFDC "be furnished with reasonable promptness to all eligible individuals."

An alternative effect of a grant maximum is to condition the scope of the statutory entitlement established under federal and state AFDC programs on the number of individuals in the recipient family. Under the Maryland maximum, for example, the members of a family of 12 are granted only half the entitlement of the members of a family of six.[2] While some diminution of per-capita entitlement may be justified by economies of scale, neither Maryland nor the other states whose maximum grant schedules have been the subject of litigation have defended such schedules as bearing any relation to actual need.[3] Federal regulations require that "A state plan . . . must . . . provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis . . ." 45 C.F.R. §233.20(a)(1); 34

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[2] Under a maximum such as California's, which imposes individual maximums on a rapidly declining scale but no overall family maximum, the effect is less onerous but the scope of entitlement is still significantly narrowed with an increase in the size of the family. Thus a family of six in California receives $50 per person ($300 total), while a family of 12 receives only $33 per person ($399 total). The California benefit scale is set out in *Kaiser* v. *Montgomery*, unreported opinion at 4, n. 3.

[3] Economies of scale are reflected in the need standard; the maximum grant reduces aid to large families below the need standard.

Fed. Reg. 1394 (Jan. 29, 1969). Absent such a rational relation between the scope of entitlement and per-capita need, it is just as irrational to condition the extent of the statutory right to receive AFDC on the size of one's family as it would be to condition it on the color of one's hair.

The bases for narrowing entitlement recognized by Congress are found (1) in the requirement that state plans provide that the determination of need shall take other income or resources of the applicant into consideration, 42 U.S.C. §602(a)(7), and (2) the termination of assistance to that member of the family unit who under the WIN program refuses employment or training without good cause, 42 U.S.C. §602(a)(19)(F). *Cf. Doe* v. *Shapiro,* 302 F. Supp. 761 (D. Conn. 1969). Absent any other evidence of congressional authorization for conditioning the scope of eligibility on some characteristic of the recipient family, the mandate that "aid . . . shall be furnished . . . to all eligible individuals" must mean that if the state furnishes aid equivalent to need to a family of six, it must do likewise with respect to a family of 12.

B. *Congress has not endorsed maximum grants.*

Appellants cite three provisions of the Social Security Act as "recognizing [the] validity of state maximum grant regulations." Brief at 3. An examination of these provisions and their legislative history shows, however, that each represents at most a *de facto* acknowledgement of the existence of grant maximums and that, like the provision at issue in *Shapiro* v. *Thompson,* 394 U.S. at 639, "the statute does not approve, much less prescribe" a system of maximum grants.

1. Section 402(a)(23).

Section 402(a)(23) of the Act, 42 U.S.C. §602(a)(23), enacted as part of the Social Security Amendments of 1967, P.L. 90-248, 81 Stat. 821, is well known to this Court as the statute at issue in *Rosado* v. *Wyman*, O.T. 1969, No. 540.[3a] It began its legislative history as an Administration proposal to require states to meet fully their own standard of need as in force during a base period and to reprice that standard by July 1, 1969 and annually thereafter.[4] The bill passed by the House as H.R. 12080, however, excluded any provision requiring an increase in benefit levels.[5] In the Senate Finance Committee the Administration proposal was dropped insofar as it required meeting need in full. The balance of the Administration proposal, requiring in AFDC a cost-of-living adjustment by July 1, 1969 and annually thereafter, was retained, and in place of the payment-of-full-need requirement the Senate Committee modified the language to require that "any maximums . . . on the amount of aid" be proportionately adjusted.[6] Numerous amendments were added on the floor of the

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[3a] The section reads:

"A State plan for aid and services to needy families with children must . . . (23) provide that by July 1, 1969 the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

[4] House Committee on Ways and Means, Hearings on H.R. 5710, 90th Cong., 1st Sess. at 59 (1967).

[5] Bureau of Social Science Research, Inc., The Legislative History of Aid to Dependent Children: A Chronological Account and Analysis of the Federal Legislative Process 249 (1969).

[6] S. Rep. No. 744, 90th Cong., 1st Sess. 293 (1967).

Senate, but condition 24 (now Section 402(a)(23)) remained intact.[7] The Senate-House Conference Committee adopted the Senate AFDC cost-of-living provision verbatim, omitting only the requirement for annual updating of need standards after July 1, 1969.[8]

The purpose of the adjustment-of-maximums requirement as part of a provision for "Increasing Income Of Recipients Of Assistance"[9] should be obvious: Without such a requirement, those states imposing grant maximums could nullify the cost-of-living-adjustment requirement by retaining the grant ceilings in force before the adjustment was made. Far from giving its stamp of approval to maximum grants, Congress at most was acknowledging their existence and taking precautions to ensure that they would not be permitted to undercut the intended effect of an ameliorative provision. As with the residency provision at issue in *Shapiro* v. *Thompson, supra*, congressional concern in enacting the cost-of-living-adjustment provision was with alleviating hardships, not with sanctioning restrictive state practices.

Moreover, the adjustment-of-maximums provision applies equally to all devices used by states in decreasing benefit levels below the standard of need, namely, individual maximums, family maximums, and percentage reductions. The Administration's proposed requirement of payment of need in full clearly covered all three. The Administration submitted with its proposal two charts, one depicting the record

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[7] 113 Cong. Rec. 33560 (1967).

[8] H.R. Rep. No. 1030 (Conference Report), 90th Cong., 1st Sess. 63 (1967).

[9] *Id.*

of those states using one or more of these mechanisms, the other expressing in dollar figures the "highest monthly amounts payable for basic needs," including those "amounts resulting from the application of a percentage or flat reduction to the amount of determined need." [10] The Administration clearly did not distinguish among the various methods of benefit reduction in explaining the necessity for requiring payment of full need. The Senate Committee acted on this record in substituting a required adjustment of "any maximums" for the meeting-need-in-full proposal. This substitution was plainly intended to require proportionate adjustments in those states not meeting need in full, by whatever mechanism benefits were reduced. It clearly did not focus on the particular device of the family maximum, which incorporates discriminations that are not present at all in across-the-board percentage reductions and that are present in less onerous form in a system of individual maximums.

2. Section 406(b).

Appellants next cite §108(a) of P.L. 87-543, 76 Stat. 172, a provision of the Public Welfare Amendments of 1962 that amended §406(b) of the Act, 42 U.S.C. §606(b). The amendment (since superseded) expanded the definition of "aid to families with dependent children" to include, for the first time, so-called protective payments, that is, payments made to an individual other than the relative with whom the dependent child is living. The provision reflected a concern that "some few [payees] have difficulty in handling their

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[10] House Comm. on Ways and Means, Section-by-Section Analysis of H.R. 5710, 90th Cong., 1st Sess. 37 (1967).

funds so that their children receive the full benefit of the money made available by the State." [11]

The House bill included "a series of safeguarding provisions," one of which required "a meeting of all need as determined by the State." [12] The Senate Finance Committee approved §108 but amended it to specify that if an individual's assistance payment plus other income or resources was equal to his state-determined need, a protective payment would be included within the definition of "aid to families with dependent children" and consequently would be subject to federal financial participation. As explained by the Senate Committee:

> "The effect of this provision is to make it possible for protective payments to be made in behalf of certain ADC recipients in States in which there is a maximum limiting the amount of assistance an individual

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[11] Testimony of Secretary Abraham Ribicoff of the Department of Health, Education, and Welfare before the Senate Finance Committee, *Hearings on H.R. 10606 Before the Senate Comm. on Finance*, 87th Cong., 2d Sess. at 137 (1962). See also H.R. Rep. No. 1414, 87th Cong., 2d Sess. 17 (1962).

[12] H.R. Rep. No. 1414 at 18. See also *id.* at 33-34; Conf. Rep. No. 2006, 1 U.S. Code Cong. & Adm. News, 87th Cong., 2d Sess. 1980 (1962). The House provision read, in relevant part:

> "(b) The term 'aid to families with dependent children' . . . includes . . . (2) payments with respect to any dependent child . . . which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another person who . . . is interested in or concerned with the welfare of such child and relative, but only with respect to a State whose State plan approved under section 402 includes provision for—
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> . . .
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> (B) meeting all of the need, as determined by the State, of individuals with respect to whom aid to families with dependent children is paid; . . ." H.R. Rep. No. 1414 at 52-53.

may receive. These are the cases in which the statutory maximum does not prevent need from being met in full according to the State's standards." S. Rep. No. 1589, 1 U.S. Code Cong. & Adm. News, 87th Cong., 2d Sess. 1956 (1962).

No Senate debate touched upon the Senate amendment of the House protective-payment provision, and §108 was passed as reported out by the Senate Committee.[13] In the Senate-House Conference Committee the House conferees receded and the Senate amendment became law.[14]

Two facts about the Senate amendment to the House version of §108 make it clear that there was no intention to place a congressional stamp of approval on family grant maximums. The first is the requirement that a state-imposed maximum not affect an individual on whose behalf a protective payment is being made. The second is the reference in the Senate Committee report to "a maximum limiting the amount of assistance an individual may receive." Like the phrase "any maximums" in §402(a)(23), this phrase is equally applicable to all methods of benefit reduction, *i.e.*, individual maximums, family maximums, or percentage factors. There is thus no evidence that Con-

[13] Conf. Rep. No. 2006 at 1980.

[14] *Id.* at 1981. The provision amended subpart (B) of §406(b), *supra* note 12, to read as follows:

"(B) making such payments only in cases in which such payments will, under the rules otherwise applicable under the State plan for determining need and the amount of aid to families with dependent children to be paid (and in conjunction with other income and resources), meet all the need of the individuals with respect to whom such payments are made; . . ." Public Welfare Amendments of 1962, 1 U.S. Code Cong. & Adm. News, 87th Cong., 2d Sess. 236 (1962).

gress focused on the particular discriminations characteristic of the type of maximum here at issue, and there is some evidence that Congress disapproved of maximums, at least to the extent of determining not to extend the option of federally funded protective payments to individuals affected by grant maximums.

3. Section 1903(f).

Appellants finally cite another provision of the Social Security Amendments of 1967, §220(a) of P.L. 90-248, 81 Stat. 821, which added to Title XIX of the Act (Medical Assistance) a new §1903(f), 42 U.S.C. §1396b(f). This provision dealt with those individuals for whom federally funded Medical Assistance could be provided on the ground that they were "medically indigent"; it reflected a congressional concern that an upper limit on the income of those eligible as medically indigent needed to be established.[15]

As reported out by the House Ways and Means Committee and passed by the House, §220(a) limited federal financial participation in Medical Assistance benefits to those whose incomes did not exceed 133⅓ per cent of the highest amount of AFDC assistance paid to a family of the same size without any income or resources. An exception to the basic formula was provided, however, authorizing the Secretary of Health, Education and Welfare, "where the operation of a uniform maximum limits payments to families of more than one size, to adjust the income limitation amount to take account of families of different sizes."[16]

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[15] 113 Cong. Rec. 23062 (1967) (remarks of Rep. Byrnes). See also H.R. Rep. No. 544, 90th Cong., 1st Sess. 118 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 176 (1967).

[16] H.R. Rep. No. 544 at 183.

The Senate Finance Committee substituted a formula based on 150 per cent of the states' standards for Old Age Assistance (OAA), rather than their standards for AFDC, a change "designed to reach the same, perhaps even a greater, magnitude of reduction in Federal obligation as does the House-approved bill" but to do so "in a more equitable, simple, and direct manner."[17] The provision was passed by the Senate and sent on to Conference, where the Senate conferees acceded to the House formula based on 133⅓ per cent of the AFDC payment level.[18] As enacted, the relevant portion of the amendment provides:

> "If the Secretary finds that the operation of a uniform maximum limits payments to families of more than one size, he may adjust the amounts otherwise determined under clause (i) to take account of families of different sizes." 42 U.S.C. §1396b(f)(1)(B)(ii).

The intent of this savings clause was clearly to avoid penalizing those who would qualify as medically indigent but for the operation of an AFDC grant maximum. Far from approving the imposition of grant maximums, the provision was designed to prevent their imposition on those who would otherwise be eligible for Medical Assistance benefits under Title XIX. Congress was here not directly concerned with, and thus cannot be considered to have passed on the validity of, grant maximums under Title IV; it was concerned, however, with avoiding an extension of the arbitrariness of such maximums into Title XIX.

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[17] S. Rep. No. 744 at 176.

[18] Conf. Rep. No. 1030, 90th Cong., 1st Sess. 63 (1967).

CONCLUSION

The Court should hold that the imposition of an arbitrary maximum on the amount of an AFDC grant is violative of the Equal Protection Clause of the Fourteenth Amendment and of the Social Security Act in that it creates a disadvantaged class of large families, which classification does not further, but subverts, the purposes of the Social Security Act and is not rationally related to any permissible state interest. The decision of the court below should be affirmed.

Respectfully submitted,

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